

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

Brief for Appellant

In the
UNITED STATES COURT OF APPEALS
For the District of Columbia Circuit

505

Docket No. 22,022
Criminal No. 1563-67

James Washington, Appellant

vs.

United States of America, Appellee

Appeal from the United States District Court
For the District of Columbia

United States Court of Appeals
for the District of Columbia Circuit

FILED AUG 14 1968

Nathan J. Paulson
CLERK

James T. Barbour,
Attorney appointed to represent
Appellant in this case.

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STATEMENT OF QUESTIONS PRESENTED

1. Were the appellant's constitutional rights under the Fourth Amendment of the Constitution violated by a police officer who without probable cause placed the appellant under arrest for housebreaking and then took the appellant to an individual who identified the appellant as the person who had committed the crime?

2. Was appellant deprived of his constitutional rights to a fair trial under the Fifth and Sixth Amendments to the Constitution through ineffective assistance of counsel?

THIS CASE HAS NOT BEFORE BEEN BEFORE THIS COURT

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For the District of Columbia Circuit

Docket No. 22,022
Criminal No. 1553-57

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United States of America, Appellee

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BRIEF FOR APPELLANT

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JURISDICTIONAL STATEMENT

Case No. 22,022 is a direct appeal under Title 28 U. S. Code 1201 without prepayment of costs. James T. Barbour, Esq., was appointed as Counsel to represent appellant, James Washington.

Appeal is taken from judgment, sentence, and commitment in District Court Criminal No. 1563-67 wherein appellant, James Washington, was sentenced on May 10, 1968, to one (1) to four (4) years on Count I of the indictment charging the offense of housebreaking under Code Section 22-1801.

STATEMENT OF THE CASE

At the trial of his case in the Court below, held on March 22 and 23, 1968, the appellant, James Washington, testified that he lived at 2917 Denver Street, S. E., Apartment 33, and that he had been living at this address for about six months. The building in which he lived was diagonally across the street from the parking lot adjacent to the Sears, Roebuck Store on Alabama Avenue. He said that he was a trumpet player and he had been at the Flamingo Night Club on Fourteenth Street most of the night of November 11, 1967, playing music, and that he had arrived at his home at about 6:00 A. M., November 12, 1967. He got off the bus in front of Sears, Roebuck and walked across the parking lot toward his home when he noticed two small boys attempting to get through the fence. He said he told the boys not to go through the fence because they might get shot and killed. The boys then went away. He had never seen either of the boys before. He then went to his home, undressed, and went to bed. Sometime later he heard conversations which awakened him, and he heard someone say, "No, that is not the one." James Washington then got

up and went to the door, and a police officer said to a small boy, "Is that the one?" and the child said, "Yes." The officer then told Washington that the child had said that Washington had told him to go into the Sears Store and get something for Washington or that Washington would kill him. The officer told Washington that he was under arrest. No property belonging to Sears, Roebuck was recovered in the apartment. James Washington denied ever having been in the Sears, Roebuck Store.

James Washington then testified that he was taken back to Sears, Roebuck Store in a truck or van. When they arrived at Sears, Roebuck, the police officer came to the back of the truck, opened the door, and there was a man standing behind the fence who waved his hand at him, after which the door was closed and James Washington was taken away.

Lomax Washington, father of the appellant, testified that he was in the apartment on the morning in question, that he admitted his son about 8:00 A.M. and offered him some breakfast which he declined, after which his son went to bed. A short time later later there was a knock on the door, and when he opened it there were two policemen and a little boy.

One of the policemen asked the boy, "Is that the man?" and he said, "No." Then they went in. Then the boy, Timothy Chachan, told the policemen that James Washington was the man who was in the store with him and Charles.

Howard Diamond testified that he was employed as credit sales manager at Sears, Roebuck Store on Alabama Avenue in Southeast Washington; that on the morning of November 12, 1967, which was a Sunday, he and about twenty other people were doing some special work on the second floor of the store building and that at about 9:45 A. M. the burglar alarm system in the store sounded. He took a flashlight and proceeded to walk down the escalator which was not then in operation, and as he did so he saw a man walking in one of the aisles about thirty feet away. The lights on the first floor were not burning. Mr.

Diamond called to the man to stop and then approached him.

They both began to walk toward the telephone, and while

Mr. Diamond was making the telephone call, the man left the store. As Mr. Diamond was coming down the escalator

he also noticed a "youngster" running out of the door.

Officer Kotlarsic testified that he responded to a burglar alarm at Sears, Roebuck Store on Alabama Avenue

in Southeast Washington at 9:42 A. M. As he arrived at the store he saw two small boys running across the parking lot adjacent to the store. He pursued them first in the scout car which he was driving and then on foot. He was later joined by another officer and together they apprehended both boys, Timothy Chachan and Charles Hershey or Green. After talking with the boys, both of whom were then eight years of age, Officer Kotlarsic went to 2917 Denver Street, S. E., Apartment 3. He knocked on the door which was opened by a man later identified as Lomax Washington, father of the defendant. The officer asked if there was anyone else in the apartment and was told that there was another person in bed in the back room. The boy Timothy Chachan identified the individual in bed as the man who had entered Sears store with him and Charles Green.

Officer Kotlarsic placed the defendant James Washington under arrest for housebreaking and took him and the two boys back to Sears' parking lot. There Mr. Diamond pointed him out as the "subject" who was inside the store. Officer Kotlarsic filed a complaint on November 13, 1967, charging the appellant with housebreaking on November 12, 1967. A preliminary hearing was held before

a Judge of the District of Columbia Court of General Sessions on November 13, 1967, and appellant was ordered held in \$1,000.00 bond for action of the grand jury. An indictment was returned by the grand jury on December 18, 1967, charging the appellant with housebreaking as defined in Title 22, Section 1801, of the Code of Laws for the District of Columbia.

At the trial the officer was allowed to testify that he had made the arrest and then had taken the defendant to Diamond for identification. Howard Diamond, Roger Desworth and Timothy Chachan identified the defendant as the man who was in the store on the morning of November 12, 1967. Defendant denied that he was in the store, and his father corroborated the fact that he had been in bed all morning from about 8:00 A. M.

CONSTITUTION, STATUTES, AND RULES INVOLVED

Constitution of the United States

Amendment IV -- Searches and Seizures. The right of people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment V -- Capital Crimes; Due Process. No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Amendment VI -- Jury Trial for Crimes, and Procedural Rights. In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

D. C. Code (1967 ed)

22-1801. "Housebreaking" defined.

Whoever shall, either in the night or in the daytime, break and enter, or enter without breaking, any dwelling,

bank, store, warehouse, shop, stable, or other building, or any apartment or room, whether at the time occupied or not, or any steamboat, canal boat, vessel, or other watercraft, or railroad car, or any yard where any lumber, coal, or other goods or chattels are deposited and kept for the purpose of trade, with intent to break and carry away any part thereof or any fixture or other thing attached to or connected with the same, or to commit any criminal offense, shall be imprisoned for not more than fifteen years.

STATEMENT OF POINTS

I. The District Court erred in allowing the police officer to testify that the appellant was identified by Mr. Diamond after the arrest was made because the arrest was illegal in that it was made without a warrant and without probable cause which resulted in violation of appellant's constitutional rights under the Fourth, Fifth, and Sixth Amendments of the Constitution.

II. Appellant was deprived of his constitutional rights to a fair trial under the Fourth, Fifth, and Sixth Amendments to the Constitution through ineffective assistance of counsel in that no objection was made to the testimony as to the identification after the illegal arrest.

SUMMARY OF ARGUMENT

There was no warrant for the arrest of James Washington in this case. The question then arises as to whether there was probable cause for the arrest. The point was not raised in the Court below, but it has been frequently held that such fundamental rights as those guaranteed by the Fourth Amendment to the Constitution are not presumed to be waived. It is submitted that the right to raise this point on appeal was not waived by the proceedings in the trial Court. Fay v. Noia, 372 U. S. 391, Rule 52(b), Federal Rules of Criminal Procedure.

The question of probable cause in an arrest without a warrant is not easily determined, but it has been held that all of the facts and circumstances must be considered before reaching a conclusion. In this case the testimony of the arresting officer indicates that the arrest was made without probable cause.

The officer arrived at the scene and saw only two small boys running from the vicinity of the store. He said he saw no adult. Under the circumstances he could reasonably conclude that the two children had done something to trigger

the burglar alarm. After he apprehended the boy Timothy Chachan, he was apparently given some information, as a result of which he went to the appellant's apartment. How this was possible does not appear in the record. How it was possible at all is a mystery. In any event, having made the arrest, the officer was not satisfied and took the appellant to Diamond for identification.

It is submitted that this procedure was highly improper and prejudicial to the appellant. The sole issue at the trial was the identification of the appellant.

Under the circumstances here the identification by the two small boys is extremely unreliable. That unreliability is demonstrated by the fact that Officer Kotlarsic took the appellant to Mr. Diamond for further identification, but this was after the arrest. It follows then that the arrest was illegal. Gatlin v. U. S. 326 F. 2d. 666. Therefore the subsequent identification by Diamond was inadmissible. Wong Sun v. United States, 288 F. 2d. 366.

The identification of the appellant is questionable for several reasons, and it may be that the identification by Diamond was the fact which tipped the scales of credibility against the appellant.

The impropriety of taking the appellant to Diamond for identification under the circumstances is readily apparent. There was no choice. Diamond was not asked to identify Washington in a group. He had seen the appellant briefly in a darkened store. Once the identification had been made it was easy for the witnesses to point Washington out in the courtroom. While it may be said, then, that this merely goes to the weight of the evidence and not to its admissibility, it is submitted that in the light of all the facts in this case, the identification of Washington by Diamond at the parking lot was inadmissible because of its extreme unreliability as well as because of the fact that it was evidence illegally obtained. It is interesting to speculate as to what the officer would have done if Diamond had not identified Washington as the man who was in the store.

To enter the home of Washington at all under the circumstances here was an illegal search. There was no testimony that the officer had a description of the man he was looking for. At the time he entered the apartment he had not talked with Diamond or Desworth. He had only some information from the eight year old boys who, in

addition to their tender years, were, by their own admission, accomplices in the crime which had been committed. Their reliability was neither alleged nor established. The Court held in Gatlin, supra, that an arrest under these circumstances is without probable cause. If the arrest was improper, so was the search. This officer said he was "invited," but the Courts have held that the invitation must be freely and intelligently given. Kovach v. United States, 53 F. 2d. 639.

Finally, while no tangible evidence was seized, and no admission was obtained from Washington connecting him with the crime, we contend that since the arrest was without a warrant and without probable cause, and therefore illegal, the identification of Washington by Diamond is the same kind of evidence. It was used against him. We can see no difference between an identification obtained as the result of an illegal arrest and an admission or confession obtained under the same circumstances.

CONCLUSION

Appellant respectfully submits that this Court should reverse the judgment below and enter appropriate relief.

Respectfully submitted,

James T. Barbour
Attorney appointed by
This Court to represent
Appellant in this cause. .

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CERTIFICATE OF SERVICE

I hereby certify that I caused a copy of the foregoing Brief for Appellant to be served on Assistant United States Attorney Harold J. Sullivan, on this _____ day of August, 1968, by hand delivering the said copy to the office of the said Assistant United States Attorney.

James T. Barbour, Esquire
Court appointed Counsel for
Appellant, James Washington

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BRIEF FOR APPELLEE

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,022

JAMES WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

United States Court of Appeals
for the District of Columbia

DAVID G. BRESS,
United States Attorney.

FILED SEP 20 1968

FRANK Q. NEBEKER,
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Nathan J. Dawson
CLERK
Gr. No. 1563-67

ISSUES PRESENTED

In the opinion of appellee the following issues are presented:

1) Was the arrest of appellant based upon probable cause where, not thirty minutes after the housebreaking at issue, he was pointed out to police officers by a juvenile accomplice who was one of two boys the police had observed fleeing from the scene of the crime and had apprehended?

2) Was testimony as to the on-the-scene identification of appellant less than thirty minutes after the offense properly admitted and/or was it violative of appellant's right to counsel or due process standards of fairness?

3) Was the performance of trial counsel so grossly incompetent that it blotted out the essence of a substantial defense?

This case was not previously before this Court under the same or a similar title.

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,022

JAMES WASHINGTON, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

COUNTERSTATEMENT OF THE CASE

By indictment filed December 18, 1967, appellant was charged with housebreaking in violation of 22 D.C. Code § 1801. This charge arose out of an incident which took place at the Sears, Roebuck and Co. store, 2845 Alabama Avenue, S.E., Washington, D.C., on Sunday, November 12, 1967. Tried in the District Court before a jury on March 22 and 25, 1967, appellant was found guilty and sentenced to from one to four years imprisonment.

The Government's Case

The prosecution presented four witnesses. Howard Diamond and Roger R. Desworth, employees of Sears, testi-

fied that on Sunday, November 12, 1967, they along with 18 other employees were doing special work in the Credit Department on the second floor of the Alabama Avenue store (Tr. 10, 104). The store was closed to the public and when about 9:45 a.m. they received a phone call from the ADT alarm system, they went to investigate. Descending the escalator they saw a man, whom at trial they positively identified as appellant (Tr. 52-53, 108-109), walking on the main floor and a small boy running out the door. They went up to the man, walked with him for a few minutes and when Diamond went to make a phone call appellant walked out the door, climbed a chain link fence and ran across the parking lot (Tr. 11-15, 104-107).

Approximately 20 to 30 minutes later they again saw appellant in the custody of the police, who had brought him up to the opposite side of the chain link fence he had previously scaled. Diamond and Desworth indicated that he was the man who had been in the store. (Tr. 33-35, 107-108.)

Timothy Cachan, an eight-year-old boy, testified that while he was near Sears playing with a friend, Charles (also eight years old), a man whom he identified as appellant (Tr. 52-53) approached and told the boys to go over the fence "to get some watches to sell and split the money up" (Tr. 54). Thereupon the three went over the fence, found an unlocked door and entered the store (Tr. 55). When they saw a man coming down the stairs the boys scurried out, followed shortly by appellant who ran out and went over the fence (Tr. 56). Timothy was shortly thereafter apprehended by the police (Tr. 57).

Next Officer Robert J. Kotlarsic testified that he received a radio call to respond to a burglar alarm at 2845 Alabama Avenue at 9:42 a.m. on the morning in question. Upon arriving on the scene he observed two small boys running across the parking lot. After capturing them and having conversed with them, the police accompanied by Timothy proceeded to Apartment 3 of 2917 Denver Street, S.E., directly across the street from Sears. (Tr. 75-76.) Kotlarsic knocked on the door and asked

Timothy if re recognized the man who opened it. Timothy said, "No." (Tr. 76, 85.) The officer explained his presence and asked if anyone else was home. The man acknowledged that there was and invited them inside. (Tr. 76, 84-85.) Inside they found appellant whom the boy identified as the man who had entered the store (Tr. 144). Appellant was placed under arrest, informed of his right to silence and brought across the street to the Sears parking lot where he was identified by the store employees (Tr. 77).

The Defense

Testifying in his own behalf, appellant stated that he had been playing trumpet at the Flamingo Club at 14th and W Streets, N.W., until the early hours of the morning in question. At about 8:00 a.m. he alighted from a bus in front of Sears. Cutting through the parking lot he observed two children trying to get behind a fence. He stopped and told them not to go into the store because there were people inside and the boys might get killed. Then the children accompanied him off the parking lot. (Tr. 137-141.) Appellant then denied having entered the store that day, described his arrest, Officer Kotlarsic's informing him of the charges against him, and the identification that took place in the Sears' parking lot (Tr. 145).

Finally Lomax Washington, appellant's father, stated that his son had been out all night and had arrived home a little after 8:00 a.m. while breakfast was being prepared. The son had immediately gone to bed. While still "getting breakfast", the father heard a knock on the door. Opening it he found two policemen and a boy. The boy said he (the father) was not the man. Whereupon they entered and the boy identified the son. (Tr. 167-168.)

SUMMARY OF ARGUMENT

I

A review of the facts encountered by the involved police officers in the course of their uninterrupted search indicates that at the moment of arrest, these officers possessed a reasonable belief that appellant had entered the Sears, Roebuck & Co. store not 30 minutes before. In these circumstances of hot pursuit it was proper for the officers to make a peaceful entry into the apartment where appellant had fled.

II

The arrest being legal, no reason appears why testimony as to the prompt on-the-scene identification of appellant should have been excluded. Counsel requirements have not been and should not be extended to such a confrontation and the record is devoid of any indication of unfairness that would violate due process.

III

This Court will only reverse in circumstances where the gross incompetence of trial counsel has blotted out a substantial defense. Thus appellant's charges in this respect lack merit when they are founded solely in counsel's failure to object to brief testimony concerning a prompt, on-the-scene, objective identification?

ARGUMENT

I. Appellant's arrest was reasonable and based upon probable cause.

(Tr. 12-13, 33, 75-76, 107-108, 145, 167)

Despite lack of objection,¹ we feel the record at hand

¹ The Government was not afforded an opportunity to defend its position on this arrest question either by argument or the submission of facts. While we believe there is sufficient reflection of probable cause in the record available, we note that in this

is adequate to assure the Court that the arresting officers acted upon probable cause. In the words of Judge Wright, "the substance of all definitions of probable cause is a reasonable ground for belief of guilt." It "is a plastic concept whose existence depends on the facts and circumstances of the particular case." *Bailey v. United States*, — U.S. App. D.C. —, 389 F.2d 305, 308 (1967). Here we know Officer Kotlarsic responded to a radio call from the police dispatcher telling him that a burglary was taking place at Sears (Tr. 75).² Arriving at Sears this officer observed the two fleeing boys. Having apprehended them with the aid of other officers, Kotlarsic interviewed the boys (Tr. 76). Whether or not the officer had a prior description of appellant, at the conclusion of this conversation he was aware of two witnesses who obviously had told him that they could point out, not only their co-felon, but precisely where he had gone. Acting on this information the officers accompanied by one of the boys went to the Denver Street address directly across from Sears. The fact that the boy—without hesitation—told the officers that the man who answered the door was not the offender (Tr. 167) could only serve to heighten the boy's reliability in the eyes of the police and assured them he was not merely attempting to shift his guilt to a convenient victim. Thereafter they entered the apartment and the boy pointed out appellant as the man who had entered Sears. Only then, less than 30 minutes after the housebreaking, was appellant arrested.

posture the only proper relief that appellant may request is a remand for a hearing on this issue. Cf. *United States v. Indiviglio*, 352 F.2d 276 (2nd Cir. 1965) (*en banc*), *cert. denied*, 383 U.S. 907 (1966); also compare *Fuller v. United States*, No. 19,532, D.C. Cir., Nov. 20, 1967 (slip op. at 24-25).

² The record does not purport to show whether this broadcast carried a description of the burglars. Presumably Mr. Diamond's telephoned report of the incident (Tr. 12) had reached the dispatcher. It can be inferred from the brevity of the post-arrest identification that a report describing appellant had reached the police officers prior to arrest. (Cf. Appellant's testimony Tr. 145.)

In (*Artis*) *Washington v. United States*, 105 U.S. App. D.C. 58, 263 F.2d 742, cert. denied, 359 U.S. 1002 (1959), identification of a housebreaker supplied to the police by a child was held to constitute probable cause for arrest without a warrant. There a 13 year old girl had confronted the defendant in the course of his housebreaking. She could only tell the police that the boy next door knew him. The boy could only provide a first name and the liquor store frequented by the suspect. Finally the liquor store owner provided a full name and address. The police then peaceably entered that address and arrested the defendant one hour after the crime.

While the police there were required to piece together the knowledge of three different persons to progress from the girl to the housebreaker, the different leads did nothing to add certainty in the minds of the arresting officers to the original identity statement given them by the girl. Assuredly the result would have been the same had the girl been able to lead the police to the defendant's abode. Here the fact that the boys were able to supply a complete rather than partial identification and location of the housebreaker in no way detracts from the officer's reasonable belief that the man identified by the boys had committed the crime.³

Similarly the decision in (*Artis*) *Washington, supra*, disposes of appellant's complaint (Br. 13) as to the legality of the officer's and the boy's entry into the apartment. There it was held on the similar facts noted above that no need existed to consider whether the invitation to enter on the part of the defendant's wife had been freely and intelligently given.⁴ The court found nothing objection-

³ Contrary to appellant's argument, the fact that the officers immediately took appellant to the scene of the crime was not an indication of lack of probable cause. Rather it was "effective and intelligent law enforcement." *Wise v. United States*, 127 U.S. App. D.C. 279, 281, 383 F.2d 206, 208 (1967).

⁴ While again there was no specific consideration given this point at trial, the record available presents no contradiction. Officer Kotlarsic testified that he had been invited in by appellant's father

able in a peaceful entry made without a warrant in the course of an unbroken search occurring one hour after the commission of the crime. Here the entry was made at the very most one-half hour after the breaking. (See Tr. 33, 107-108.) The Supreme Court has recently made an identical ruling on this "hot pursuit-entry" issue in *Warden v. Hayden*, 387 U.S. 294, 298 (1967). Also see *Chappell v. United States*, 119 U.S. App. D.C. 356, 358, 342 F.2d 935, 937 (1965).

II. Testimony concerning the prompt on the scene identification of appellant should not have been excluded and in no way violated his right to counsel or due process standards of fundamental fairness.

(Tr. 33-34, 107-108, 129)

Citing *Gatlin v. United States*, 117 U.S. App. D.C. 123, 326 F.2d 666 (1963), appellant only contends that testimony as to his prompt identification should have been excluded as stemming from an illegal arrest. It is initially emphasized that in presenting its first witness the government did not attempt to elicit testimony as to this identification; rather it was originally brought out by defense counsel's thorough cross-examination (Tr. 33-34). Thereafter the Government touched on this subject with its final witness, Mr. Desworth (Tr. 107-108). In any event this argument fails when it is pointed out (*supra*) that the arrest at issue was proper.⁵

Although appellant—properly, we feel—does not seek to raise any additional points, it may be appropriate to point out the inapplicability of the 1967 Supreme Court iden-

(Tr. 76), while the father giving a general narrative of the incident and not addressing himself to the invitation question said only, "And they came in" (Tr. 167).

⁵ In *Bailey v. United States*, *supra*, — U.S. App. D.C. at —, 389 F.2d at 309, Judge Wright recently distinguished *Gatlin* as a case involving arrest for investigation. Here, where no search occurred, there was no such purpose. Like in *Bailey* there is "no suggestion of a round up of innocent suspects."

tification decisions of *United States v. Wade*, 288 U.S. 218 and *Stovall v. Denno*, 388 U.S. 293 to the present case.

Wade required the presence of counsel at post-indictment lineup proceedings. To our knowledge only one appellate decision has addressed itself to the effect of *Wade* on the prompt identification situation here. In *Commonwealth v. Bumpers*, 3 Crim. Law Reporter 3207 (Mass. June 14, 1968), the Supreme Judicial Court of Massachusetts permitted the police this immediate confrontation procedure absent counsel.

While there has been no such decision in either the Supreme Court or this Court, we feel that recent opinions of both Courts indicate that the right to counsel will not be extended to the facts at hand. *E.g.*, see *Simmons v. United States*, 390 U.S. 377, 384-385 (1968) (approving the showing of photographs absent counsel in the fresh offense situation); *Terry v. Ohio*, 88 S.Ct. 1868 (1968) (permitting detention and frisking in suspicious circumstances short of probable cause); *Dorsey v. United States*, — U.S. App. D.C. —, 372 F.2d 928 (1967) (permitting on the street police action to investigate suspicious circumstances); *Allen v. United States*, — U.S. App. D.C. —, —, 390 F.2d 476, 478-479 (1968) (refusing to apply rigid right to counsel at questioning requirements so as to hamper on the street police investigation).^{*} Also see dissenting opinion in (*Roosevelt*) *Wright v. United States*, No. 20,151, decided January 31, 1968, slip op. 10, n.2 (indicating that in circumstances similar to those here a prompt one man confrontation is justifiable as assuring reliability); and *Kennedy v. United States*, 122 U.S. App. D.C. 291, 353 F.2d 462 (1965) (this Court's pre-*Wade* approval of prompt confrontation after hot pursuit).

Here the prompt presentation of appellant served the following interests: the memory of each witness was at its strongest; the police could corroborate their action and possibly garner new evidence; if despite probable cause

^{*} A supplemental opinion was filed in *Allen* August 23, 1968.

they had taken custody of an innocent party, negative identification would have set appellant free immediately and released the police to search for the offender. Such considerations militate against an extension of *Wade*.

Finally the record reveals no unfair conduct that could be said to violate the due process standards of *Stovall, supra*. The fact that appellant was dressed in different clothing at the identification (Tr. 129) indicates a complete absence of any suggestive conduct on the part of the police. The due process analysis of circumstances more suggestive than those at hand in *Wise v. United States*, 127 U.S. App. D.C. 279, 282-83, 383 F.2d 206, 209-10 (1967) tells us that a "prompt identification of a suspect close to the time and place of an offense", "if anything, promotes fairness by assuring reliability."

III. The defense presented by trial counsel was in no sense incompetent and cannot be viewed as reversible error.

(Tr. 13-14, 106, 108, 128, 145)

The burden on appellant in making the charge that his defense counsel's performance fell below the minimum guarantee of the Sixth Amendment is a heavy one. *Bruce v. United States*, 126 U.S. App. D.C. 336, 339, 379 F.2d 113, 116 (1967). Relief will only be granted upon a showing that "there has been gross incompetence of counsel and that this has in effect blotted out the essence of a substantial defense." *Bruce v. United States, supra*, 126 U.S. App. D.C. at 339, 340, 379 F.2d at 116-117. *Dyer v. United States*, 126 U.S. App. D.C. 312, 379 F.2d 89 (1967) illustrates the kind of extreme facts required for reversal. There, where the district judge dismissed four counts and had seriously considered dismissing the remainder, defense counsel had failed to call or confer with a material witness, had never talked to his client until the day of trial and had repeatedly allowed the introduction of hearsay evidence.

Here ineffectiveness of counsel is said to inhere in the isolated failure to object to testimony as to a prompt identification confrontation, the consequence of an allegedly illegal arrest. This argument lacks merit, first because as we have shown the arrest was proper, and secondly, because the prompt identification in this case did not violate any of appellant's rights as to counsel or due process. Here there was no evidence seized by the police that would possibly suggest the propriety of an objection or motion to suppress. Moreover, there is every indication that the store employees could have identified appellant independent of the post-arrest confrontation. (Compare Tr. 13-14, 106 with Tr. 108, 128, 145.) As this Court recently said in *Harried v. United States*, No. 20,372, D.C. Cir., November 30, 1967 (slip op. 6):

We reject the notion that it is defense counsel's duty to "make every motion in the book" in the hope that one may succeed. On this record there was no compelling reason to move for suppression.

It is submitted that the record clearly reflects a vigorous effort on the part of counsel which omitted no substantial defense and made the trial a truly adversary proceeding.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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